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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 655

WILLIAM PEARLMAN, WILLIAM BLANK, BLAIR BROWN AND LEONARD COHEN,
Petitioners,

v.

STATE OF MARYLAND,
Respondent.

(ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND)

BRIEF FOR RESPONDENT IN OPPOSITION

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The Daily Record Co., Baltimore 3, Md.

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OPINION BELOW

The opinion of the Court of Appeals of Maryland appears in full on pages 4-17 of the Appendix to the Petition for Writ of Certiorari, and is also reported in 232 Md. 251, 192 A. 2d 767.

JURISDICTION

The final judgment of the Court of Appeals of Maryland was entered on September 9, 1963, but Respondent denies that jurisdiction is founded under 28 U.S.C., 1257(3), as alleged by Petitioners.

QUESTIONS PRESENTED

It is believed by the Respondent that the following questions clarify the questions presented by the Petitioner.

1. Was the indictment legally sufficient to charge Petitioners with the crime of conspiracy?

2. Were Petitioners denied due process of law by being convicted of an offense with which they were not charged?

STATUTE INVOLVED

Chapter 87 of the Acts of Maryland, 1945, codified as Code, Article 27, Section 40 (1957 Edition):

> "In any indictment or warrant for the crime of conspiracy, it shall be sufficient to use a formula substantially to the following effect: 'That A-B and C-D on the day of , 19 at the County (City) aforesaid unlawfully conspired together to murder X-Y (or other conspiracy here stating briefly the object of the conspiracy) against the peace, government and dignity of the State'."

STATEMENT

Petitioners William Pearlman and William Blank were President and Secretary-Treasurer, respectively, of the Reynolds Engineering & Supply Co., Inc., incorporated in September, 1956, and engaged primarily in selling home improvements to home owners. Blair Brown was sales manager of the corporation from April 30 to August 6, 1959 and Leonard Cohen was credit manager from August, 1958 until the date of indictment.

Most of Reynolds' customers were persons who could not qualify for legitimate home improvement work, because of bad credit rating. The company would learn of these persons and its salesmen would contact them. Standard operating sales procedure was for the salesman to induce

the customer, after selling him on the need for Reynolds to do his work, to sign a contract which established the improvements to be made, the cash price and number of monthly payments. The customer was required to sign a fire insurance endorsement, a homeowner's authorization, an estoppel, a confessed judgment note and mortgage form —all of which were in blank. The cash price of the job shown on the contract was subsequently doubled, plus 10 percent of the total cost. The time price was later written in the note and mortgage in Reynolds' office, out of the customer's presence, and the mortgage then recorded. The paper was then discounted and assigned to another corporation.

The salesmen of Reynolds were schooled by Appellants and assisted in obtaining from customers blank notes and mortgages and other documents for work to be done, with all efforts turned toward the concealment of the true nature of the documents being signed. Squads of Reynolds' emissaries, including, in many cases, one or more of Appellants, descended upon the potential customer, deliberately and calculatingly fast talking, high-pressuring and confusing the said customer, until he signed the documents thrust before him, the contents of which were concealed. In many cases, the customers were widows without business experience, unlearned and illiterate persons, or old people unable to cope with the smooth sales talk of Appellants and their salesmen.

Appellants and their representatives either did not advise the customers that they were executing a mortgage, when they should have, or when directly asked, denied that a mortgage was being signed. Once the mortgage and other documents were signed in blank, Appellants then raised the discussed price to a figure in most cases more than double. They promised and misrepresented "insurance"

coverage which was neither given nor contemplated by them.

Testimony throughout the case demonstrated clearly that Appellants knowingly and purposely concealed from customers the fact that a mortgage was being executed, because, had they been told, the deal could never have been consummated.

Once the mortgages were signed, they were illegally notarized and recorded. The first that many of these customers found of the existence of the mortgages was at the State's Attorney's office and the figures thereon bore no relation to those initially discussed by the customer with either Appellants or their salesmen.

Judge Anselm Sodaro, sitting in the Criminal Court of Baltimore, returned a general verdict of guilty against these Petitioners upon a two-count indictment charging conspiracy. Thereafter Petitioners noted an appeal to the Court of Appeals of Maryland, which affirmed the conviction. Petitioners thereafter filed a Motion For Reargument, which, on September 9, 1963, was denied.

ARGUMENT

This case represents one of the boldest and most insidious plots to swindle and cheat the public ever perpetrated in the history of the State of Maryland. The trial court found as a fact that the corporation, in its existence, sold more than 2500 jobs and in connection with these sales the Petitioners here conspired among themselves and with others in a scheme of fraud and false pretenses which was classic in the extreme.

It is respectfully suggested that a review on certiorari by this Court is neither necessary or desirable and that no question warranting decision by this Court is presented.

I.

The Indictment Was Legally Sufficient to Charge Petitioners With the Crime of Conspiracy.

In *State v. Davis*, 203 N.C. 13, 35, 164 S.E. 737, 745, cert. den. *Davis v. State of North Carolina*, 287 U.S. 649, 53 S. Ct. 95, 77 L. Ed. 561, the Court said:

> "The gist of a conspiracy is the unlawful concurrence of two or more persons in a wicked scheme — the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means . . . Indeed, the conspiracy is the crime and not its execution . . . 'As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete.'
>
> "There is a distinction between the offense to be committed and the conspiracy to commit the offense. In the one, the corpus delicti is the act itself. In the other, it is the conspiracy to do the act . . ." See: *State v. Bellin*, 55 R.I. 374, 181 A. 804.

Certainly, under long-standing prior decisions of the Maryland Court of Appeals, the indictment here complained of is not constitutionally defective. In *State v. Buchanan*, 5 H. & J. 317 (1821), the indictment, in two counts, charged defendants with conspiracy, falsely, fraudulently and unlawfully, by wrongful and indirect means, to cheat, defraud and impoverish the president, directors and company of the bank of the United States; the second count charged these persons with a conspiracy only (not executed as in the first count), falsely, fraudulently and unlawfully, by wrongful and indirect means, to cheat, defraud and impoverish the president, directors and company of the bank of the United States. The indictment, following as it did the common law form of pleading, was held not insufficient.

In *Blum v. State*, 94 Md. 375, 51 A. 26 (1902), the indictment charged appellants with conspiring (and was held not deficient):

> "'by means of diverse false pretences and representations, and other false and subtle means and devices to obtain and acquire unto themselves certain properties, moneys, goods and chattels', of certain corporations and persons named in the indictment, . . . of the value of $2,500, and to cheat and defraud such persons and corporations." Accord: *Archer v. State*, 145 Md. 128, 125 A. 744 (1924) and *Lockhart v. State*, 145 Md. 602, 125 A. 829 (1924).

In 1945, by Chapter 87 of the Acts of the Maryland General Assembly, the short-form indictment (set out hereinbefore, p. 2), was enacted. Subsequent thereto, in *Winkler v. State*, 194 Md. 1, 10, 69 A. 2d 674, cert. den., 339 U.S. 919, 70 S. Ct. 621, 94 L. Ed. 1343 (1952), the indictment (fifth count) charged that Appellants: "unlawfully did conspire, combine, confederate and agree together and with each other unlawfully, riotously and tumultuously to assemble and gather together to disturb the peace," though it did not spell out the details of how the breach of peace was to be carried through, just as here the indictment pleaded the unlawful conduct of and false pretenses practiced by Appellants, in that they conspired to cheat and defraud the public and did unlawfully conspire, by false pretenses to obtain the properties, money, goods and chattels of the public, with the intent to cheat, wrong and defraud them, in matters relating to home improvements, though not supplying the details of how the conspiracy was effected, in the manner Appellants claim was required.

In *McGuire v. State*, 200 Md. 601, 92 A. 2d 582, cert. den., 344 U.S. 928, 73 S. Ct. 496, 97 L. Ed. 714, (1952), the second count of an indictment charged a conspiracy to

violate the "laws of the State of Maryland relating to lotteries" and the same was held not to be defective. Accord: *Hurwitz v. State*, 200 Md. 578, 583, 92 A. 2d 575, where the Court said:

> ". . . in Maryland, in case of criminal conspiracy the form of indictment reflects the nature of the crime of conspiracy, as defined and explained 130 years ago in the opinion of this Court, by Judge Buchanan, in *State v. Buchanan*, 5 H. & J. 317. For present purposes the outstanding characteristics of the common law crime of conspiracy are (1) that (unlike the federal general conspiracy statute) the crime is complete in the conspiracy without any overt act, and (2) that (like a conspiracy to defraud the United States) a criminal conspiracy may consist of a conspiracy to do things which are not themselves criminal if done by one person. After a review of the English authorities over a period of 400 years, illustrating these two characteristics, the opinion in *State v. Buchanan* reached the conclusion that, 'and such is the character of conspiracy, so ramified is it in its nature, the object and tendency of it being that, from which it derives its criminality, that it would be exceedingly difficult to give a single specific definition of the offense. By a course of decisions running through a space of more than four hundred years, from the reign of Edward III. to the 59 of George III, without a single conflicting adjudication, these points are clearly settled:' (stating nine points, including) '7th. For a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time — as in the *King v. Gill & Henry* . . . and 9th. That in a prosecution for a conspiracy, it is sufficient to state in the indictment, the conspiracy and the object of it; and that the means by which it was intended to be accomplished need not be set out, being only matters of evidence to prove the charge, and not the crime itself, and may be perfectly indifferent. . . . From all which it results, that every conspiracy to do an unlawful act,

or to do a lawful act for an illegal, fraudulent, malicious or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offense, though nothing be done in execution of it, and no matter by what means the conspiracy was intended to be effected; which may be perfectly indifferent; and makes no ingredient of the crime and therefore, need not be stated in the indictment.'. . . 'and in the *King v. Eccles*, 1 Leach's Crown cases 274, the indictment was for a conspiracy, by wrongful and indirect means, to impoverish one Booth, a tailor, and to deprive and hinder him from following and exercising his trade. In the first count in the indictment, the object of the conspirators was alleged to have been accomplished, and in the second count, the conspiracy only was charged. It was not denied that the conspiracy was an indictable offense, and the only objection on part of the defendant was, that the acts done to impoverish Booth, ought to have been set out in the indictment. But it was decided by the whole Court, that it was sufficient to allege the conspiracy and the object of it, the illegal combination being the gist of the offense; and that it was not necessary to state the means, by which the intended mischief was effected; for that the offense did not consist in doing the acts by which the end was accomplished (for they might be perfectly indifferent) but in the conspiring with a view to effect the intended mischief by any means. . . .' Though in some respects these principles and rules seem to permit loosely drawn indictments, in other respects they express only the logic and common sense (and some times the sheer necessity) of the case. An indictment for robbery or larceny must ordinarily state the property stolen and the name (if known) of the owner. If, however, pickpockets conspire to ply their trade in a public place it is manifestly impossible to state what property they conspire to steal or whom they conspire to rob."

Thus, an examination of Appellants' ingenious and misleading rhetoric reveals that they (1) quarrel with the rules of the common law, (2) complain of no overt act requirement in State criminal conspiracies and (3) seek to convince this Court that not only must the conspiracy be well pleaded in the indictment (as it is here) but also that the mechanics of its execution, i.e., the offense to be committed, must also be included and pleaded. The above authorities, we suggest, under the common law, make no such demands upon the State.

Traditionally, common law states have upheld the validity of indictments framed as here. In *People v. Fields*, 288 Mich. 166, 284 N.W. 685, 687, the Court said, quoting from the earlier case of *People v. Watson*, 75 Mich. 582, 42 N.W. 1006:

> ". . . public policy requires that Courts should lend active aid in punishing persons who conspire to obtain money or other valuable thing by means of false pretenses, with intent to cheat and defraud. . . ."

In *State v. Malone*, 13 N.J. Super. 510, 80 A. 2d 592, 597 aff'd., 16 N.J. Super 383, 84 A. 2d 745, the Court said:

> "A conspiracy to cheat and defraud by means of false pretense was also indictable at common law. 3 Chitty, Criminal Law, 3rd Am. ed. 1836, 1179; 2 Russell, Crime (9th Ed. 1936), 1451. In *State v. Young & Stainsby*, 37 N.J.L. 184, 187 (Sup. Ct. 1874), Chief Justice Beasley said: 'Mr. Bishop, in his second volume on Criminal Law, Sec. 171, says that the English Courts now hold, although doubts were entertained in the earlier stage of the inquiry, that the words "unlawfully, fraudulently and deceitfully, did conspire, combine, confederate and agree together to *cheat and defraud*" one "of his goods and chattels," contain a sufficient allegation of conspiracy without the mention of any means intended'."

And see *Outlaw v. United States*, C.C.A. Tex. 81 F. 2d 805, 806, 807, cert. den.; 298 U.S. 665, 56 S. Ct. 747, 80 L. Ed. 1389, where the second count, held to be sufficient, alleged simply the conspiracy to be one "to defraud the United States."

Compare the following cases, wherein indictments used the words "cheat" and "defraud", in connection with averments relating to use of false pretenses or false tokens: *Commonwealth v. Wallace*, 16 Gray 221, 223; *Alderman v. People*, 4 Mich. 414, *State v. Harroun*, 199 Mo. 519, 98 S.W. 467; *People v. Brady*, 56 N.Y. 182.

Appellants allege, at page 16 of their Petition herein: "If an indictment charges a conspiracy to commit murder or arson or some other indentifiable substantive offense, that in itself supplies some idea of the criminal conduct alleged. . . ." But fraud, not to mention "wrongdoing" and "impoverishing," is so elastic a concept, embracing an infinite variety of conduct, that a bare allegation of a conspiracy to defraud supplies no comparable indication of the offense.

Can the indictment here be said to be unilluminating when it charges that the Appellants, in the home improvement business, unlawfully conspired with themselves and others, by means of false pretenses, to cheat and defraud their customers and the public, of their property and money, or that they conspired, by false pretenses, to acquire the properties and money of their customers and the public, with the intent to cheat and defraud them? Clearly, what appellants would have the indictment allege was not only the conspiracy, but in addition, what was effected, pursuant to the conspiracy. As stated in *Glasser v. United States*, 315 U.S. 60, 66, 62 S. Ct. 629, 86 L. Ed. 680:

> "The particularity of time, place, circumstances, cause, etc., in stating the manner and means of effect-

ing the object of a conspiracy, for which petitioners content, is not essential to an indictment. . . ."

"The indictment charges that the United States was defrauded by depriving it of its lawful governmental functions by dishonest means; it is settled that this is a 'defrauding' within the meaning of Sec. 37 of the Criminal Code."

Appellants, while not raising here the question of denial of particulars, do complain they should have been granted to them. As indicated by the Maryland Court of Appeals (Apx. 14), they show no prejudice, but merely claim a disadvantage because of the denial. In a matter such as the question of particulars, traditionally the trial courts have wide latitude as to whether they should be granted; in this case, since the indictment followed a constitutionally proper form, as pointed out hereinabove, error has not been shown, it is respectfully submitted, in the absence of a showing of prejudice.

II.

The Petitioners Were Convicted of the Crime With Which They Were Charged.

Appellants complain that the indictment failed to name at least some of the persons against whom the alleged conspiracy was directed. The trial court (Apx. 12) correctly stated the law when it said that "where a fraud is worked upon customers as a whole then designation as a class is sufficient". See *Glasser v. United States*, 315 U.S. 60, 66, 62 S. Ct. 457, 86 L. Ed. 680, rehearing den., sub nom. *Kretske v. United States*, 315 U.S. 827, 62 S. Ct. 629, 86 L. Ed. 1222; *Archer v. State*, supra, 15 C.J.S., pp. 1116, 1117, *Conspiracy*, Section 84, "*Persons conspired against*"; *State v. Malone*, supra, 80 A. 2d 592, at 597. In 2 Wharton, *Criminal Law* (11th Ed. 1912), 1820, Sec. 1663, it is stated: ". . . where, however, the conspiracy was to defraud a class

not capable of being at the time resolved into individuals or to defraud the public generally, then the specification of names is impracticable, and hence unnecessary."

Appellants further seek to make much of the distinction under the common law between the type of criminal conspiracy whose means are unlawful, and those with wrongful objectives. Quite clearly, the Maryland Court of Appeals found that the indictment charged a conspiracy to do an unlawful act by unlawful means and that that had been what the trial court had decided (Apx. 14, 15). Apparently, appellants do not necessarily quarrel with this appellate finding, but argue rather that the State took a somewhat different approach to it in its appeal brief. The answer to this may lie in semantics, i.e., the obtaining and acquisition of the properties and money of the persons and class conspired against might not be in and of itself an unlawful object; obtaining and acquiring such, with the intent to cheat and defraud and by means of false pretenses, would be. It was the latter unlawful object which the Court of Appeals found to have been the object of the conspiracy. However, the indictment stands or falls on a consideration of its clear language; under the authorities cited hereinbefore, it measures up to constitutional standards. In any event, it is to be supposed that even appellants would agree that so long as the means are unlawful (whatever the object — lawful or unlawful), conspiracy will lie. See 15 C.J.S., pp. 1057, 1058, 1065, *Conspiracy*, Sections 35, 42.

Can Appellants seriously argue that there cannot be charged under the common law a conspiracy to do an unlawful act by unlawful means? It seems they do not and the Court of Appeals correctly pointed out that the form of indictment herein had been employed in Maryland

as early as *State v. Buchanan*, supra, and was not then held bad for duplicity.

As stated at 15 C.J.S., pp. 1057, 1058, "*Conspiracy*", Section 35: "The offence thus defined excludes only confederations to accomplish lawful objects by lawful means; the offence includes all possible unlawful confederations."

CONCLUSION

The Respondent respectfully submits that an examination of Petitioners' arguments and the position which they take indicate that there is no substantial Federal question involved, and further that the decision below turns upon matters solely within the province of the State Courts and, therefore, this case should not be reviewed by this Court. For the reasons heretofore assigned, the Petition filed to this Honorable Court for the issuance of a writ of certiorari should be denied.

Respectfully submitted,

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